

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

TOMMIE L. VANDERPOOL, )  
 )  
Plaintiff, ) No. 03:10-cv-06264-HU  
 )  
vs. )  
 )  
MICHAEL J. ASTRUE, ) **FINDINGS AND RECOMMENDATION**  
Commissioner of Social Security, )  
 )  
Defendant. )

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1 - FINDINGS & RECOMMENDATION

1 HUBEL, United States Magistrate Judge:

2 The plaintiff Tommie L. Vanderpool brought this action for  
3 judicial review of the Commissioner's decision denying her  
4 applications for Disability Insurance benefits under Title II of  
5 the Social Security Act, 42 U.S.C. § 1381 *et seq.*, and Supplemental  
6 Security Income under Title XVI of the Act. In Findings and Recom-  
7 mendation entered June 14, 2012, the undersigned recommended that  
8 the Commissioner's decision be reversed, and the case be remanded  
9 for further proceedings. Dkt. #20. Neither party filed objections  
10 to my recommendation, and on July 5, 2012, Judge Michael W. Mosman  
11 adopted my recommendation, entering judgment for Vanderpool. Dkt.  
12 ##22 & 23.

13 Vanderpool now moves for an award of attorney's fees under the  
14 Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA), in the amount  
15 of \$5,146.25, and costs of \$350.00. Dkt. ##24 & 25. The amount of  
16 attorney's fees represents a settlement and stipulation between the  
17 parties. See Dkt. #24. For the reasons set forth below, I recom-  
18 mend the motion be granted.

19 EAJA requires an award of attorney's fees to a prevailing  
20 plaintiff in a Social Security appeal, "unless the court finds that  
21 the position of the United States was substantially justified or  
22 that special circumstances make an award unjust." 28 U.S.C.  
23 § 2412(d). In the present case, based on my previous finding that  
24 the Administrative Law Judge erred in his evaluation of the  
25 evidence, I conclude that the defendant's position was not  
26 substantially justified, and thus an award of EAJA fees is  
27 appropriate.

1 Determining that a plaintiff is a "prevailing party" for  
2 purposes of an entitlement to EAJA fees is only the first step in  
3 considering a motion for EAJA fees. "It remains for the district  
4 court to determine what fee is 'reasonable.'" *Hensley v.*  
5 *Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d  
6 40 (1983). The *Hensley* court observed that "[t]he most useful  
7 starting point for determining the amount of a reasonable fee is  
8 the number of hours reasonably expended on the litigation  
9 multiplied by a reasonable hourly rate," *id.*, which calculation  
10 results in a "lodestar." *Webb v. Ada County, Idaho*, 195 F.3d 524,  
11 527 (9th Cir. 1999) (citing *McGrath v. County of Nevada*, 67 F.3d  
12 248, 252 (9th Cir. 1995)). The lodestar may be adjusted to reflect  
13 the results obtained in the case. *Id.* (citing *Schwarz v. Sec'y of*  
14 *Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995)). The  
15 district court enjoys "considerable discretion . . . in determining  
16 what attorney's fee is reasonable." *Id.*

17 The court first will look at "the number of hours reasonably  
18 expended on the litigation." *Hensley, supra*. The time records  
19 submitted with the plaintiff's motion indicate that attorney  
20 Kathryn Tassinari expended 28.55 hours in this case (2.7 hours in  
21 2010, 24.15 hours in 2011, and 1.7 hours in 2012). Preliminarily,  
22 the court notes that an expenditure of 28.55 hours falls within the  
23 twenty to forty hour range Judge Michael W. Mosman found to be a  
24 "reasonable amount of time to spend on a social security case that  
25 does not present particular difficulty." *Harden v. Comm'r*, 497  
26 F. Supp. 2d 1214, 1215 (D. Or. 2007) (noting "some consensus among  
27 the district courts" on this point; citing cases). Judge Mosman  
28 agreed that "[a]bsent unusual circumstances or complexity, . . .

1 this range provides an accurate framework for measuring whether the  
2 amount of time counsel spent is reasonable." *Id.*

3 In the present case, the administrative record was 578 pages  
4 long. The plaintiff's opening brief was twenty pages long, and  
5 raised four issues requiring legal analysis of the ALJ's treatment  
6 of the evidence and his conclusions. After review of the Commis-  
7 sioner's nineteen-page brief, the plaintiff filed an eleven-page  
8 reply. The attorney's time records indicate the time expended by  
9 counsel in this case was reasonable. None of the entries repre-  
10 sents clerical or secretarial tasks not payable under EAJA. *See,*  
11 *e.g., Gough v. Apfel*, 133 F. Supp. 2d 878, 881 (W.D. Va. 2001)  
12 (noting that "[p]urely clerical activities, regardless of who  
13 performs them, are considered overhead and are not compensable as  
14 EAJA attorney fees"). I therefore conclude that the 28.55 hours  
15 expended by the plaintiff's counsel in this case is reasonable  
16 under the circumstances.

17 In considering the applicable hourly rate, the statute itself  
18 sets a \$125 per hour ceiling<sup>1</sup> "unless the court determines that an  
19 increase in the cost of living . . . justifies a higher fee." 28  
20 U.S.C. § 2412(d)(2)(A). To adjust for the cost of living, the  
21 Ninth Circuit applies the national Consumer Price Index for All  
22 Urban Consumers (the "CPI-U"), not seasonally adjusted, and  
23 applying the "all items" index. *Jones v. Espy*, 10 F.3d 690, 692-93  
24 (9th Cir. 1993). The cost-of-living increase is "calculated by  
25 multiplying the \$125 statutory maximum hourly rate by the . . .

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26  
27 <sup>1</sup>Congress raised the rate for EAJA fees from \$75 to \$125 per  
28 hour in 1996. The CPI-U index, all items, not seasonally adjusted  
for 1996, was 155.7.

1 CPI-U for the years in which the attorney's work was performed and  
 2 dividing by the CPI-U figure for March 1996 (155.7), the effective  
 3 date of the statutory maximum hourly rate." *Nadarajah v. Holder*,  
 4 569 F.3d 906, 918 (9th Cir. 2009) (citing *Thangaraja v. Gonzales*,  
 5 428 F.3d 870, 876-77 (9th Cir. 2005)).

6 The EAJA-adjusted hourly rate for 2010 is \$175.06<sup>2</sup>; for 2011  
 7 is \$180.59<sup>3</sup>; and for 2012 is \$184.95.<sup>4</sup> Multiplying counsel's hours  
 8 for the respective years results in attorney fees of \$472.66 for  
 9 2010 (2.7 hours x \$175.06); \$4,361.25 for 2011 (35.7 hours x  
 10 \$180.59); and \$314.42 for 2012 (1.7 x \$184.95); for a total of  
 11 \$5,148.33 for all three years. This amount is \$2.08 more than the  
 12 \$5,146.25 to which the parties have stipulated.

13 Accordingly, I recommend that the plaintiff's motion (Dkt.  
 14 #24) for EAJA fees in the amount of \$5,146.25 and costs in the  
 15 amount of \$350.00 be granted.

#### 16 17 **SCHEDULING ORDER**

18 These Findings and Recommendation will be referred to a  
 19 district judge. Objections, if any, are due **November 2, 2012**.  
 20 If no objections are filed, then the Findings and Recommendation  
 21 will go under advisement on that date. If objections are filed,  
 22 then a response is due by **November 19, 2012**. When the response is  
 23  
 24

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25 <sup>2</sup>\$125 x (2010 annual index of 218.056/155.7) = \$175.06.

26 <sup>3</sup>\$125 x (2011 annual index of 224.939/155.7) = \$180.59.

27 <sup>4</sup>\$125 x (2012 index for August, the most recently-available  
 28 month, of 230.379/155.7) = \$184.95.

1 due or filed, whichever date is earlier, the Findings and  
2 Recommendation will go under advisement.

3 IT IS SO ORDERED.

4 Dated this 16th day of October, 2012.

5 /s/ Dennis J. Hubel

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Dennis James Hubel  
Unites States Magistrate Judge